Walter Wright (Singapore) Pte Ltd v Director General of Inland Revenue

HIGH COURT (JOHORE BAHRU) — TAX APPEAL NO 14-1-88
LC VOHRAH J
22 MARCH 1990

Revenue Law — Income tax — Sources of income — Business income — Royalties — Business of letting of cranes and trucks — Whether business income — Double taxation — Company in Singapore letting cranes to company in Malaysia for profit — Income charged to tax in Singapore — Whether chargeable to tax in Malaysia as royalties — Whether relief under double taxation agreement available — Income Tax Act 1967, s 4

The appellant was a company incorporated and resident in Singapore with no permanent establishment in Malaysia. It received income from the letting of cranes on hire to a Malaysian company called Walter Wright (M) Sdn Bhd for use in Malaysia. The appellant was assessed to income tax in Singapore in respect of the said income on the basis that it was business income pursuant to the Singapore Income Tax Act (Cap 141, 1970 Ed). The respondents on its part raised assessments in respect of the said income, having regard to s 4(d) of the Income Tax Act 1967 ('the Act') and art VIII of the agreement between the government of Malaysia and the government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The Special Commissioners of Income Tax confirmed the assessments and the appellants then appealed to the High Court. The question for determination was whether relief was available to the appellant having regard to s 4(a) of the Act and art IV of the agreement. The respondent had raised the assessment on the basis of art VIII of the agreement which provided in effect that royalties derived from Malaysia by a resident of Singapore may be taxed in Malaysia.

Held, allowing the appeal:

(1) It is clear that rental income, despite the fact that it is referred to specifically in s 4(d) of the Act, may nevertheless constitute income from a source consisting of business if it is receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent. The Special Commissioners had found that the business of the appellant consisted of hiring out cranes and trucks in Malaysia and it was not an inconsequential sideshow but was its lifeblood. There was no doubt that, under the Act, the rental income of the appellant was business income and not only rental income.

(2) The nature of the income had to be determined by the Act and the law which charged it to tax also had to be the Act and only once these factors were established according to the Malaysian domestic law could the agreement be resorted to in order to determine whether relief was available. Relief in this case was clearly afforded by art iv of the agreement so long as the said income was regarded as business income under s 4(a) of the Act.

(3) The agreement could not be utilized to change the character of the said income from business income to that of royalties. The agreement could not be treated as a charging or taxing statute instead of as an agreement for relief against taxation.

(4) Paragraph 1 of art VIII of the agreement is merely permissive in its terms; it envisages a situation in which 'royalties' within its definition may not be subject to relief but does not, and cannot, by implication impose a tax on income which is specifically afforded relief by art IV.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 01-53-90.]

Case referred to

1 *American Leaf Blending Co Sdn Bhd* v *Director-General of Inland Revenue* [1979] 1 MLJ 1 (folld)

Legislation referred to

Income Tax Act 1967 s 4
Income Tax Act (Cap 141, 1970 Ed) [Sing]

KH Koh for the appellant.
Zaleha Zahari (Senior Federal Counsel) for the respondent.

Cur Adv Vult

LC Vohrah J: The appellant was incorporated in Singapore and is resident in Singapore with no permanent establishment in Malaysia. It carries on in Singapore the business of hiring cranes and trucks for profit. For the two years ending 30 June 1976 and 1977 it received income from the letting of cranes on hire to Walter Wright (M) Sdn Bhd for use in Malaysia ('the said income') in the following amounts:

Y/E 30 June	Trade Receipt
1976	$ 36,800
1977	$595,560
	$632,360

The appellant was assessed to income tax by the Singapore government in respect of the said income on the basis that it was business income pursuant to the Singapore Income Tax Act (Cap 141, 1970 Ed). The respondent on its part raised the assessments in respect of the said income as follows:

Y/A	Date of N/A	CI	Tax
1976	4 Dec 1985	$ 18,400	$ 3,680
1977	4 Dec 1985	$316,180	$63,236
1978	4 Dec 1985	$297,780	$59,556
		$632,360	

These assessments were raised by the respondent having regard to s 4(d) of the Income Tax Act 1967 ('the ITA') and art VIII of the agreement between the government of Malaysia and the government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on incomes ('the DTA') scheduled to the Double Taxation Relief (Singapore) Order 1968 ('the Relief Order'). The Special Commissioners of Income Tax confirmed the assessments raised by the respondent. Hence this appeal.

The question for determination is whether relief is available to the appellant having regard to s 4(a) of the ITA and art IV of the DTA.

It would be convenient at this point to reproduce the main provisions which have been referred to. Section 4 of the ITA reads:

> 4 Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of —
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> (a) *gains or profits from a business, for whatever period of time carried on*;
> (b) gains or profits from an employment;
> (c) dividends, interest or discounts;
> (d) *rents, royalties or premiums*;
> (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
> (f) gains or profits not falling under any of the foregoing paragraphs.
>
> (Emphasis added.)

Articles IV and VIII of the DTA read as follows:

> Article IV
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> 1(a) The income or profits of a Singapore enterprise *shall not* be taxable in Malaysia *unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia*. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment in Malaysia.
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> (b) The income or profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carries on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the income or profits of the enterprise but only so much thereof as is attributable to that permanent establishment in Singapore.
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> 2 Where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing independently with the enterprise of which it is a permanent establishment.
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> 3 In determining the income or profits of a permanent establishment, there shall be allowed as deductions all expenses including executive and general administrative expenses, which would be deductible if the permanent establishment were an independent enterprise in so far as they are reasonably allocable to the permanent establishment, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.
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> 4 No income or profits shall be derived by or attributed to a permanent establishment by reason of the mere purchase and transportation by that permanent establishment of goods or merchandise for the enterprise.
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> (Emphasis added.)
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> Article VIII
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> 1 Royalties derived from sources within one of the Contracting States by a resident of the other Contracting State *may be taxed* in the Contracting State from which the royalties are derived.
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> 2 *The term 'royalties' as used in this Article means payments of any kind received as consideration* for the use of, or the right to use, any copyright, patent, trademark, design or model, plan, secret formula or process or *for the use of*, or the right to use *industrial, commercial or scientific equipment*, or for information concerning industrial, commercial or scientific experience, but does not include any royalty or other amount paid in respect of literary or artistic copyrights or of motion picture films or of tapes for television or broadcasting or of the operations of a mine, oil well, quarry or other place of extraction of natural resources or of timber or forest produce.
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> 3 Sums derived by a resident of one of the Contracting States from sources within the other Contracting State from the alienation of any right or property from which royalties as defined in paragraph 2 of this Article, are or may be derived, may be taxed in the Contracting State from which the sums are derived.
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> 4 *The provisions of paragraphs 1 and 3 of this Article shall not apply if the recipient of the royalties or sums, being a resident of one of the Contracting States has in the other Contracting State from which the royalties or sums are derived, a permanent establishment with which the right or property giving rise to the royalties or sums is effectively connected. In such event, the provisions of Article IV shall apply.*
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> 5 Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties or sums paid, having regard to the use, right, property or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.
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> 6 Royalties as defined in paragraph 2 of this Article shall be treated as derived from sources within the Contracting State in which the property from which such royalties are derived is used.
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> 7 Sums derived from the alienation of any right or property referred to in paragraph 3 of this Article shall be treated as derived from sources within the Contracting State in which such right or property is used.
>
> (Emphasis added.)

In the Privy Council case of *American Leaf Blending Co Sdn Bhd* v *Director-General of Inland Revenue*,[1] it was held that rents despite the fact that they were referred to in s 4(d) of the ITA 'might nevertheless constitute income from a source consisting of a business if they were receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent' because 'there is plainly room for overlapping between one paragraph and another' having regard to the ordinary meaning of the words in the various paragraphs of s 4. On this authority it is clear that rental income, despite the fact it is referred to specifically in s 4(d), may nevertheless constitute income from a source consisting of a business if it is receivable in the course of carrying on a business of putting the taxpayper's property to profitable use by letting it out for rent. In this connection it is pertinent to note that the Special Commissioners found that 'the business of the company consisted of hiring out

cranes and trucks in Malaysia and as the accounts show — and the revenue does not dispute this — it was not an inconsequential sideshow but was its lifeblood. So there is no doubt that under Malaysian domestic law, ie the ITA, the rental income of the taxpayer is business income and not only rental income'.

There is no question in this appeal that the appellant was carrying on the business of letting out its cranes and trucks for hire and having regard to the overlapping principle propounded by the above authority the said income should under the ITA be characterized as 'gains or profits from a business' chargeable to tax under s 4(a). So the question I now have to address is whether the express provisions of para 2 of art VIII of the DTA can be called in aid by the respondent to displace the characterization according to the overlapping principle in order to bring into charge for Malaysian tax the said income on the ground that it is royalty although on the basis of the overlapping principle it is business income which is clearly not chargeable to tax by reason of para 1(a) of art IV.

The ITA is a taxing statute, an Act of Parliament for the imposition of income tax. The DTA, brought into effect by the Double Taxation Relief (Singapore) Order 1968, is an agreement for the avoidance of double taxation and prevention of fiscal evasion in respect of taxes on income. There is no question in this case of fiscal evasion. I agree with counsel for the appellant that the nature of the income has to be determined by the ITA and the law which charges it to tax also has to be the ITA and that only once these factors are established according to the Malaysian domestic law can the DTA be resorted to in order to determine whether relief is available. Relief in this case is then clearly afforded by art IV so long as the said income is regarded as business income under s 4(a). I therefore find myself unable to accept the contention of counsel for the respondent that the said income is chargeable to tax in Malaysia by reason of art VIII on the ground that it constitutes 'royalties' within the definition contained in para 2 of that article, in other words that the provisions of para 1 of that article that 'royalties' may be taxed in the Contracting State from which they are derived render the said income chargeable to Malaysian income tax. To do so would be not only to utilize the DTA to change the character of the said income from business income to that of royalties but also to treat the character of the DTA as that of a charging or taxing statute instead of an agreement for relief against taxation. In any event, I also agree with counsel for the appellant, as conceded by counsel for the respondent, that para 1 of art VIII is merely permissive in its terms; it envisages a situation in which 'royalties' within its definition, may not be subject to relief but does not, and in my judgment, cannot, by implication, impose a tax on income which is specifically afforded relief by art IV. Accordingly, I am of the opinion that the Special Commissioners were wrong in confirming the assessments raised by the respondent in this case. The appeal is allowed with costs.

Appeal allowed.

Solicitors: *KH Koh, Cheong & Kok.*

Reported by *PS Ranjan*

Public Prosecutor v Abdul Rahim bin Abdul Satar

HIGH COURT (KUALA LUMPUR) — SELANGOR
CRIMINAL APPEAL NO 52-20 OF 1988
WAN YAHYA J
4 NOVEMBER 1989

Evidence — Hearsay evidence — Document listing serial numbers of trap money — Whether police officer maker of document — Whether document inadmissible on ground that maker of statement not called

Criminal Procedure — Power of court to summon and examine persons — Witness not called by prosecution but made available to defence — Power of trial judge to call for witness's evidence under s 425 of Criminal Procedure Code — Whether usurpation of prosecution's power — Criminal Procedure Code (FMS Cap 6), s 425

The appellant was tried before the sessions court judge for an offence under s 3(a)(i) of the Prevention of Corruption Act 1961 and two other offences under s 4(a) of the same Act. In the course of the prosecution's case, the investigating officer ('IO') produced a list (P7) bearing the numbers of all the trap notes recovered from the appellant's pocket. The IO had received this list from another officer, Lai. Counsel for the appellant objected to the production of P7 contending that as Lai was not called but merely made available to the defence, the list was inadmissible as it is hearsay evidence. The trial judge disagreed but exercised his power under s 425 of the Criminal Procedure Code (FMS Cap 6) ('CPC') to call for Lai's evidence, to which the appellant's counsel also objected. In this appeal against his conviction for the third offence under s 4(a), the issues raised are first, whether P7 was inadmissible as being hearsay evidence and secondly, whether the learned sessions court judge was empowered under the circumstances to exercise his power under s 425 of the CPC.

Held, dismissing the appeal:

(1) The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not ipso facto turn the writer into the maker of a document within the contemplation of the hearsay rule.

(2) The affirming person for whose purpose or on whose behalf the averments contained in the documents are made is the actual maker of the document. Exhibit P7 is a mere acknowledgment and receipt between the IO and the complainant and Lai is merely the person who assisted in the preparation of the acknowledgment and receipt.

(3) The trial judge had considered it essential in order to arrive at a just decision to call for the formal evidence of Lai, which he was entitled to do and bound to do so under s 425 of the CPC.